IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 662

IN THE MATTER OF GLOBE VARNISH COMPANY, A CORPORATION, DEBTOR.

S. L. NUDELMAN, DIRECTOR OF FINANCE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

GLOBE VARNISH COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN E. CASSIDY,
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ELI J. BIBO,
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Of Counsel,
Attorneys for Petitioner.

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S. L. NUDELMAN, DIRECTOR OF FINANCE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

GLOBE VARNISH COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, S. L. Nudelman, Director of Finance of the State of Illinois, respectfully prays for the issuance of a writ of certiorari herein, directed to the United States Circuit Court of Appeals for the Seventh Circuit, to review a certain final decision of the said Circuit Court of Appeals in the above entitled cause, the opinion and decision having been rendered and filed on July 23, 1940,

and a Petition for Rehearing having been filed on the 6th day of August, A. D. 1940, within the time allowed for filing of the same in accordance with the provisions of Rule 22 of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit, which said Petition for Rehearing, after being entertained and considered by the said Court, was denied on the first day of October, A. D. 1940, and this Petition for the issuance of a writ of certiorari together with a supporting brief annexed hereto and a certified transcript of record being filed herewith in this Court within three (3) months after denial of the said Petition for Rehearing by the said United States Circuit Court of Appeals for the Seventh Circuit.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

For convenience sake and to better follow the proceedings in the courts below, the Petitioner herein, S. L. Nudelman, Director of Finance of the State of Illinois, will be referred to as the Claimant; and the Respondent, Globe Varnish Company, a corporation, will be referred to as the Debtor.

In the reorganization proceedings of the Debtor, Globe Varnish Company, a corporation, instituted under Section 77-B, in the District Court of the United States, for the Northern District of Illinois, Eastern Division, the Claimant, S. L. Nudelman, Director of Finance of the State of Illinois, filed an amended claim in the sum of $1,594.87 for taxes alleged to be due to the State of Illinois under the Illinois Retailers' Occupation Tax Act.

The Debtor filed objections to this claim; and the claim and objections thereto were referred to Carl R. Chindblom,

Referee in Bankruptcy, as Special Master. Evidence was heard and taken before the Special Master and he submitted a Supplemental Report, recommending that the Debtor's objections to the amended claim be overruled and that the claim be allowed in full for the said sum of $1,594.87.

The Debtor filed exceptions to the Supplemental Report of the Special Master. The matter came on for hearing before the District Court on the said exceptions, and an order was entered disapproving the Supplemental Report as to a portion of the claim, the disallowed portion being in the sum of $560.57.

The errors relied on for reversal in the United States Circuit Court of Appeals for the Seventh Circuit arose out of the District Court's finding that the disallowed portion of the claim represented a tax on sales made by the Debtor to the railroads, requiring the movement of the materials sold across State lines and therefore being held to be transactions in interstate commerce.

There is no material dispute between the parties as to the facts involved. The Debtor, Globe Varnish Company, was engaged in the business of selling tangible personal property for use or consumption within the purview of the Illinois Retailers' Occupation Tax Act. It is an Illinois corporation with its principal place of business at Chicago, Illinois. The railroad companies, to whom the sales had been made, all had offices and freight stations at Chicago, Illinois.

By Stipulation filed in the District Court, the parties agreed that the claim of the Claimant in the total sum of $1,594.87, consisted of $1,034.30 due on account of sales alleged to have been made to painting contractors, and the further sum of $560.57 which was alleged to be due as a tax on sales by the Debtor to railroads. (Stipulation, Rec.

52, 53.) The tax alleged to be due on these latter sales is the matter in controversy in the case at bar.

The transactions of sale involved were all of a similar nature, the Debtor's Exhibits 1, 1A, 2 and 2A, having by Stipulation been taken as typical. (Stipulation, Rec. 52, 53.) In each instance, an order would be sent to the Debtor from the Chicago office of the railroad for the purchase of certain specified materials, the consignee being designated as an out-of-State shop or office of the purchasing railroad. All orders were f.o.b. Chicago and required delivery by the Debtor to the local (Chicago) freight station of the purchasing railroad, thence to be forwarded to an out-of-state shop or office of the railroad via its own lines.

In each instance the Debtor delivered the materials to the local (Chicago) freight station of the purchasing railroad for shipment to its out-of-state shop or office. The Debtor would receive a bill of lading acknowledging receipt of the materials for shipment out of the State, a waybill would be issued in accordance with the conditions of the bill of lading, and the materials were placed in a car of the purchasing railroad and transported from Chicago to its out-of-state shop or office. The Claimant for the purpose of the record did not deny that the materials actually were shipped by the railroad to its out-of-state shop or office.

While considerable evidence was heard and taken before the Special Master, in the main it is not of material importance in determining the issues involved. The Claimant is of the belief that the meat of this testimony was contained in a few brief statements made by the Debtor's own witness, B. B. Melgaard, the assistant to the purchasing agent at the Chicago office of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. This pertinent tes-

timony is at the top of page 47 of the Transcript of Record:

> "Q. In other words, it does not show the consignee is—
> A. (Interrupting.) The consignee here is the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, storekeeper, Milwaukee Shops, Milwaukee Wisconsin.
> Q. They are the purchasers and they are also the carrier, the transporter?
> A. That is right. We carry our material to our shops at Milwaukee."

This is a clear indication that the railroad had no doubts as to whose material it was transporting from Chicago, Illinois, to Milwaukee, Wisconsin. As the witness stated, the railroad was carrying its own property, and not the property of the Debtor.

It may only be necessary to add that since the transactions were f.o.b. Chicago, the Debtor paid no freight. There also was nothing to show that the railroad had set up on its own books or records any freight charges for the transportation of the materials from its Chicago freight station to its out-of-state shop or office.

The District Court made a finding that in these sales to the railroads "the movement of the materials across State lines was an essential part of the sales, and that, therefore, the sales were transactions in interstate commerce and not subject to the tax. Said claim should be disallowed to the extent that it represents taxes on the receipts from the sales of this kind to the railroads." (Order, Rec. 85.) It was from this portion of the order, overruling the recommendation contained in the Special Master's Supplemental Report, that the Claimant perfected an appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

The said Circuit Court of Appeals rendered an opinion and decision affirming the order of the District Court. It is noteworthy, however, that the court's opinion was not unanimous. The majority opinion was delivered by the Honorable, Judge William M. Sparks, and concurred in by the Honorable, Judge J. Earl Major. The Honorable, Judge Walter C. Lindley did not concur with the majority and filed a vigorous dissenting opinion, upholding the validity of the tax on the sales by the Debtor to the railroads. Both the majority and the dissenting opinions are set forth verbatim in the appendix attached.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; Chapter 229, 43 Stat. 936; entitled "An Act To Amend The Judicial Code, and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court, and for other purposes," and reading as follows:

> "Sec. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect as if the cause had been brought there by unrestricted writ of error or appeal."

The Court may entertain jurisdiction by virtue of Rule 38 of the Revised Rules of the Supreme Court of the

United States, adopted February 13, 1939, and effective as of February 27, 1939, subsection 5 (b) thereof reading as follows:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The special and important reasons advanced by the Petitioner and addressed to the Court's judicial discretion are set forth under Point IV of this Petition, entitled "Reasons Relied On for the Allowance of the Writ."

The United States Circuit Court of Appeals for the Seventh Circuit on July 23, 1940, *by a divided court* affirmed the order or decree of the District Court of the United States, for the Northern District of Illinois, Eastern Division. (Rec. 112.) A Petition for Rehearing was filed on August 6, 1940, within the time allowed as provided by Rule 22 of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit (Rec. 112-113); and the said Petition for Rehearing was denied on October 1, 1940. (Rec. 113.)

A certified Transcript of Record, the Petition for the issuance of a writ of certiorari herein, and the supporting Brief annexed thereto are filed herein with the Clerk of this Court within three (3) months after denial of the said Petition for Rehearing by the United States Circuit Court of Appeals for the Seventh Circuit.

III.

QUESTIONS PRESENTED.

1. Whether interstate commerce is involved where a common carrier purchases tangible personal property, accepts delivery of or title to the said property within the State of purchase, and then transports the said property by its own means of carriage to a foreign State for its own use or consumption.

2. Whether a non-discriminatory State occupation tax, measured by the gross receipts on sales derived from engaging in the occupation of selling tangible personal property for use or consumption, is applicable to a sale of such property to a common carrier where the contract of sale provides for delivery of the property to a shop or office of the common carrier in a foreign State, but where delivery is actually made and title is passed to the carrier within the State of origin and the property is then transported by the carrier's own facilities to its shop or office in a foreign State for its own use or consumption.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1.

The United States Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in a way probably in conflict with a State statute.

Section 2 of the Illinois Retailers' Occupation Tax Act (1939) Illinois Revised Statutes [Bar Ass'n Ed.], Chapter 120, Par. 441) provides in part as follows:

> "Section 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State * * *."

In defining the phrase "selling * * * at retail", Section 1 of the Act (1939 Illinois Revised Statutes [Bar Ass'n Ed.], Chapter 120, Par. 440) provides in part as follows:

> "Section 1. 'Sale at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."

Thus as provided by the two above Sections of the Act, any and all persons engaged in the business or occupation of selling tangible personal property at retail within the State of Illinois come within the purview of the said Act. Further, selling at retail is defined as any transfer of the ownership of, or title to tangible personal property to a purchaser for use or consumption.

With reference to the passage of title as determining whether or not the sales in the case at bar were within

the purview of the Act, the majority opinion rendered by the Circuit Court of Appeals read as follows:

> "In the instant case, we think it makes no difference when the title passed, and we are unable to perceive how that fact, whenever it occurred, could be determinative of the character of the sale, as to whether it was an interstate or an intrastate transaction." (Opinion, Rec. 105.)

On the same point, Judge Lindley in his dissenting opinion said the following:

> "When this vendor delivered the merchandise to the carrier in Chicago, receiving bills of lading acknowledging receipt of the merchandise, under contracts of sale providing for delivery f.o.b. Chicago title passed to the purchaser. Performance of the contract of sale was completed in Illinois, *People* v. *Young*, 237 Ill. 196 at 201. The seller parted with its title there; the purchaser acquired title there. Thereafter the property was that of the vendee, and the seller had no interest therein. The property was from that time thenceforth under the domain and control of the buyer, who alone was endowed with the right to recover for damage thereto in transit, *Pacific Exp. Co.* v. *Spaulding & Co.*, 199 Ill. App. 474. The sales were completed in Illinois, title passed in Illinois, and the taxes assessed in no wise conflict, infringe upon or cast a burden upon interstate commerce." (Rec. 108, 109.)

The Petitioner submits that the majority opinion rendered by the Circuit Court of Appeals in this particular has limited the interpretation placed by the Illinois Retailers' Occupation Tax Act upon what constitutes a "sale at retail" within the purview of the said Act.

2.

The decision of the Circuit Court of Appeals is in conflict with and nullifies Article IX, Section 1, of the Constitution of the State of Illinois. The said decision also has adjudicated an important question of local law in a way probably in conflict with applicable local decisions.

Article IX, Section 1 of the Illinois Constitution of 1870 provides in part as follows:

> "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—
> * * *"

This is what is known as the uniformity clause of the Illinois Constitution; and no principle has become more firmly established within the jurisdiction of the State of Illinois than the principle that there must be equality and uniformity in taxation.

Prior to the present Illinois Retailers' Occupation Tax Act, the State Legislature had enacted an occupation tax act which attempted to exempt from its provisions those engaged in the business of selling either farm produce or motor fuel. In the case of *Winter* v. *Barrett,* 352 Ill. 441, the Illinois Supreme Court ruled that these purported exemptions were in direct violation of the uniformity clause of the Illinois Constitution and held the entire act invalid.

The constitutionality of the present Illinois Retailers' Occupation Tax Act was attacked in the case of *Reif* v. *Barrett,* 355 Ill. 104, where the contention was raised that it violated the uniformity clause of the Illinois Constitution. However, the Illinois Supreme Court overruled this contention and held on page 122 of its opinion that "there is no lack of uniformity in the law or its application."

In the case of *Franklin County Coal Co.* v. *Ames*, 359 Ill. 178, where the Coal Company contended it was exempted from the operation of the Illinois Retailers' Occupation Tax Act because of the fact that it was a producer of coal and sold only in wholesale or carload lots, the court said on page 183 of its opinion:

> "If we were to construe the Act so as to exclude them from it, a lack of uniformity would result and the Act would be unconstitutional."

The decision of the Circuit Court of Appeals in the case at bar has the effect of exempting from the Act a certain class of sales consummated within the State of Illinois, to-wit: the sale of tangible personal property at retail to railroads. This not only conflicts with the uniformity clause of the Illinois Constitution but also with numerous decisions of the Illinois Supreme Court which have consistently sustained this principle of uniformity in taxation. Exemption from taxation is never to be presumed; but on the contrary the presumption is strongly against exemption from taxation of any person or group of persons falling within a particular class against whom a tax is operative.

3.

The United States Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

Approximately twenty-seven states in the Union and the City of New York have some form or other of sales tax laws. In all of these states, there are numerous railroads making purchases of tangible personal property for their own use or consumption; and the total amount of sales involved runs into millions of dollars annually. It has been estimated that in Illinois alone the Retailers' Occu-

pation Tax due on sales of tangible personal property to railroads, being three per cent of the gross sales, is in the approximate sum of one hundred thousand dollars yearly.

The question is whether or not these sales are in interstate commerce where the railroad, after making the purchase in Illinois, transports the property from Illinois to a foreign state for its own use or consumption. Then even if it should be assumed that these transactions are in interstate commerce, are they protected by the Commerce Clause of the Federal Constitution so as to exempt them from the operation of the Illinois Retailers' Occupation Tax Act?

This question as we have indicated is of paramount importance not only to the State of Illinois but to all the other states and the City of New York which have enacted sales tax laws.

There are two decisions bearing on the question that have been rendered by state appellate courts. In *Standard Oil Co. of California* v. *Johnson,* 92 Pacific (2d) 470, an appellate court of California held that transactions of this nature were in interstate commerce and not subject to the California Sales Tax Law. However, in *State Board of Equalization* v. *Blind Bull Coal Co.,* 101 Pacific (2d) 70, the Supreme Court of the State of Wyoming held that these transactions were *not* in interstate commerce and were within the purview of the Wyoming Sales Tax Act.

The precise question involved in the case at bar has never been submitted to or passed on by this Court; and in view of the generally wide interest in all the states having sales tax laws in addition to the State of Illinois, the Petitioner respectfully submits that this Court should entertain jurisdiction for a final adjudication of the issues involved.

4.

The United States Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

A.

In determining that the transportation by a common carrier of its own property across state lines is to be deemed as being in interstate commerce, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Superior Oil Company v. *Mississippi,* 280 U. S. 390, 394, 395.

Eastern Air Trans. Inc. v. *So. Carolina Tax Commission,* 285 U. S. 147, 153.

The Pipe Line Cases, 234 U. S. 548, 561, 562.

Edelman v. *Boeing Air Trans. Inc.,* 289 U. S. 249, 252.

Nashville, C. & St. L. R. Co. v. *Wallace,* 288 U. S. 249, 267.

Pennsylvania R. R. Co. v. *Public Utilities Commission,* 298 U. S. 170, 173, 174.

B.

In determining that completed transactions of sale in the case at bar between residents of the same state are in interstate commerce, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Schecter Poultry Corp. v. *United States,* 295 U. S. 495, 542, 543.

Atlantic Coast Line R. R. v. *Standard Oil Company,* 275 U. S. 257, 267.

Banker Bros. v. *Pennsylvania,* 222 U. S. 210, 214.

C.

In holding that a tax levied in one state upon property destined to be taken to and used in another state is to be deemed a direct burden on interstate commerce, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Superior Oil Company v. *Mississippi,* 280 U. S. 390, 394, 395.

Eastern Air Trans. Inc. v. *So. Carolina Tax Commission,* 285 U. S. 147, 153.

Heisler v. *Thomas Colliery Co.,* 260 U. S. 245, 259.

D.

In holding that property which may be part of a flow of interstate commerce cannot be subject to a non-discriminatory state tax, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Minnesota v. *Blasius,* 290 U. S. 1, 9, 10.

Bacon v. *Illinois,* 227 U. S. 504, 516.

Coe v. *Errol,* 116 U. S. 517, 528.

E.

In adjudicating that a state occupation tax measured by gross receipts from interstate commerce when fairly apportioned to the commerce carried on within the taxing state cannot be sustained, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Western Live Stock v. *Bureau,* 303 U. S. 250, 254, 255, 256, 259.

Postal Telegraph-Cable Co. v. *Richmond,* 249 U. S. 252.

U. S. Express Co. v. *Minnesota,* 223 U. S. 335.

F.

In holding that the state of origin cannot levy a sales tax because the state of destination *may* levy a compensating or use tax, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Southern Pacific v. *Gallagher,* 306 U. S. 167, 172.

Henneford v. *Silas Mason Co.,* 300 U. S. 577, 587.

Ohio Tax Cases, 232 U. S. 576, 593.

Wright v. *Louisville & N. R. R. Co.,* 195 U. S. 219, 222.

Kidd v. *Alabama,* 188 U. S. 730, 732.

G.

In adjudicating that a state may not levy an occupation or sales tax because interstate commerce may be or is involved as an incident to the sale, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

McGoldrick v. *Berwind-White Coal Mining Company,* 309 U. S. 33.

Graybar Electric Co. v. *Curry,* 189 Southern 186, 308 U. S. 513. (Rehearing denied, 308 U. S. 638).

Superior Oil Company v. *Mississippi,* 280 U. S. 390.

Eastern Air Trans. Inc. v. *So. Carolina Tax Commission,* 285 U. S. 147.

5.

One of the actual parties in interest is the sovereign State of Illinois and the State's revenue is involved in the case at bar.

The Petitioner in the case at bar and the Claimant in the original action is S. L. Nudelman, Director of Finance of the State of Illinois. This action was not brought by him in his individual capacity but as the chief tax enforcement official of the State of Illinois. The real party in interest is the State of Illinois and the subject matter in issue involves the State's revenue.

The Petitioner wishes to point out that the Illinois Statutes have the following provision with reference to appeals:

> "Appeals shall be taken directly to the Supreme Court * * * in all cases relating to revenue, or in which the State is interested as a party or otherwise." (1939 Illinois Revised Statutes [Bar Ass'n Ed.], Chapter 110, Par. 199; Sec. 75 of Ill. Practice Act.)

Within the jurisdiction of Illinois, practically in all instances appeals from a trial court must be taken to an intermediate appellate court. It is only in a few isolated examples such as indicated above that an appeal is directed to be taken from the trial court to the Supreme Court. Where the State is a party or where the State's revenue is involved, it is deemed of paramount importance that the issues should be determined directly by the Supreme Court so that there may be a more rapid and final adjudication.

In the case at bar, the Petitioner likewise addresses himself to the Court's discretion in praying for the issuance of a writ of certiorari so that there may be a final adjudication by the Court of last resort, to-wit: the Supreme Court of the United States.

Wherefore, the Petitioner respectfully represents that the Petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be granted.

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